

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIOUS CORNELLE CARSWELL,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 268081

Wayne Circuit Court

LC No. 05-003548-04

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WILLIAM MATHIS,

Defendant-Appellant.

No. 268082

Wayne Circuit Court

LC No. 05-003548-01

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

In these consolidated cases, defendant, Cornelious Cornelle Carswell, appeals as of right his bench trial convictions for kidnapping, MCL 750.349, and assault with intent to do great bodily harm less than murder, MCL 750.84. Carswell was sentenced to 135 months to 40 years' imprisonment for his kidnapping conviction and to two and a half to ten years' imprisonment for his assault with intent to do great bodily harm less than murder conviction. We affirm his convictions and sentences.

Similarly, in the companion case, defendant, Ronald William Mathis, appeals as of right his bench trial convictions for kidnapping, MCL 750.349, and assault with intent to do great bodily harm less than murder, MCL 750.84. Mathis was sentenced to 12 to 40 years' imprisonment for his kidnapping conviction and to two to ten years' imprisonment for his assault with intent to do great bodily harm less than murder conviction. We affirm his convictions and sentences, as well.

I. FACTS

On March 20, 2005, the victim, Dontay Pinkston, was visiting his girlfriend at her friend's house in Detroit, Michigan, where several people were gathered. At some point, Pinkston's friend, John Thompkin, arrived at the house and repeatedly accused Pinkston of stealing marijuana and a gun. Pinkston denied taking the marijuana, and Thompkin told Pinkston not to leave the house and that defendant Mathis was on his way to kill Pinkston.

Defendant Mathis, Tyrece Gooden, and defendant Carswell forcefully entered the house, and, according to Pinkston, Mathis pointed a gun at him, so he ran and hid in the attic. Thompkin grabbed Pinkston out of the attic, and Gooden, Carswell, and Thompkin dragged Pinkston down the stairs. Pinkston stated that they all had weapons.

Once downstairs, defendant Mathis began questioning Pinkston about the marijuana and gun. When Pinkston denied having either, defendant Mathis threatened to kill him and hit him in the jaw. The men then started to beat up Pinkston, and they pulled him out of the house and threw him into the back of defendant Mathis's vehicle. The men then blindfolded Pinkston, drove around and beat him, looking for a place to kill him, until Pinkston dove out the back window.

II. SUFFICIENCY OF THE EVIDENCE

Carswell first argues that the prosecution presented insufficient evidence to sustain his convictions. We disagree.

A. Standard of Review

"In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

B. Analysis

"The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis added by *Brown* Court). "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *Brown, supra* at 147, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

"To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the

principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568-569; NW2d 728 (1995).]

Here, the evidence sufficiently showed that Carswell committed assault with intent to do great bodily harm less than murder or that he aided and abetted in this offense. The evidence showed that Mathis, Thompkin, Gooden, and Carswell abducted Pinkston. While Pinkston was hiding in the attic, Thompkin, Carswell, and Gooden pulled him down the stairs and into the kitchen. After Pinkston declared that he did not know where the stolen gun and drugs were, Pinkston said Mathis punched him in the jaw with his fist. At that point, all four men started to beat him up and forced him into Mathis's Tahoe. Pinkston was then driven around the Detroit area for the purpose of being killed. While in the Tahoe, Mathis and Thompkin repeatedly beat up Pinkston. As a result of the beatings, Pinkston sustained a broken nose and jaw, and other injuries.

Although Carswell argues that the evidence failed to show that he caused Pinkston's injuries, we conclude otherwise. Pinkston maintained that all four men, including Carswell, beat him up during the incident at issue. Pinkston also maintained that he was beat up again by all four men while outside of Mathis's friend's home. During this time, the men used their fists and poles, and they kicked Pinkston. This evidence was sufficient to show that Carswell assaulted Pinkston, and that Carswell intended to do great bodily harm less than murder. *Brown, supra* at 147.

But even if the evidence was insufficient to prove that Carswell committed the offense as a principal, the prosecution presented sufficient evidence, to show that Carswell aided and abetted in this offense. Mathis punched Pinkston in the jaw after Carswell, Thompkin, and Gooden pulled him down the stairs and into the kitchen. While it is true that Pinkston only claimed that Mathis and Thompkin attacked him during the time that they were riding around in the Tahoe, Carswell drove the Tahoe during this time, which enabled Mathis and Thompkin to repeatedly attack Pinkston. During this time, Mathis also hit Pinkston on the head with a gun. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *Carines, supra* at 757, quoting *Turner, supra* at 568. Therefore, because the evidence sufficiently showed that Mathis and Thompkin assaulted Pinkston, that Carswell performed acts that assisted the assault, and that Carswell intended the commission of the crime or had knowledge that Mathis and Thompkin intended its commission at the time he gave aid and encouragement, the prosecution presented sufficient evidence to show that Carswell aided and abetted in this offense. Accordingly, we conclude that the prosecution sufficiently established the elements necessary to sustain Carswell's conviction for assault with intent to do great bodily harm less than murder. *Brown, supra* at 147.

The prosecution also presented sufficient evidence to sustain Carswell's kidnapping conviction. To prove forcible confinement kidnapping, the prosecution must prove the following elements beyond a reasonable doubt: "(1) a forcible confinement of another within the state, (2) done willfully, maliciously and without lawful authority, (3) against the will of the person confined or imprisoned, and (4) an asportation of the victim which is not merely incidental to an underlying crime *unless* the crime involves murder, extortion or taking a hostage." *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984) (emphasis in original).

Although Carswell argues that the prosecution failed to prove the asportation element of this offense because Pinkston was not abducted for the purpose of the kidnapping, but rather for the purpose of locating the stolen gun and drugs, the evidence presented showed otherwise. The evidence showed that Pinkston was abducted for the purpose of being killed over a stolen gun and drugs. After Pinkston repeatedly told the men that he did not steal anything from them, he was forced into Mathis's Tahoe and was told that he was going to be killed. While in the car, the men repeatedly told Pinkston that if he did not give them the marijuana, he was going to be killed. Pinkston said that the men continued to drive around and, while still beating him up, were looking for a place to kill him. The prosecution proved the elements of the offense, i.e., a forcible confinement of another within the state, done wilfully, maliciously and without lawful authority, against Pinkston's will, and an asportation of Pinkston. *Wesley, supra* at 388.

III. SENTENCING

Carswell next argues that the trial court erred when it scored his sentencing guidelines. Carswell argues that the trial court incorrectly scored offense variable one (OV 1) at 15 points and offense variable two (OV 2) at five points. Again, we disagree.

A. Standard of Review

"We review the trial court's scoring of a sentencing guideline variable for clear error." *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 579 (2003). A scoring decision is not clearly erroneous if the evidence on record supports the score. *Id.*

B. Analysis

"OV 1 assesses points for the aggravated use of a weapon." *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004); see also MCL 777.31. OV 1 can be scored at 15 points if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c). OV 2 assesses points for the "lethal potential of the weapon possessed or used." MCL 777.32. OV 2 may be assessed at five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d).

The trial court did not err when it scored OV 1 at 15 points and OV 2 at five points. The evidence supported the scoring. The evidence showed that guns were used during the incident at issue and that Pinkston was hit with a gun during this time. Although the trial court did not find Carswell and Mathis guilty of felony-firearm, the court did find, based on the evidence presented, that a gun was used during the incident at issue by at least one of the men. In any event, in multiple offender cases, "if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b); MCL 777.32(2). Before Carswell was convicted and sentenced, two other defendants, Gooden and Thompkin, pleaded guilty to possession of a firearm during the commission of felony and were assessed 15 points for OV 1 and five points for OV 2 for the incident at issue. Therefore, because this is a multiple offender case and the evidence supported the trial court's scoring, the trial court did not err in its scoring.

IV. JUDICIAL RECUSAL

We also reject Mathis's argument that Judge Jones was biased against him and should have removed herself from this case.

A. Standard of Review

Mathis did not move for disqualification below. Therefore, we review this unpreserved issue for plain error affecting Mathis's substantial rights. *Carines, supra* at 763.

B. Analysis

Judicial disqualification is proper if a judge cannot impartially hear a case. MCR 2.003(B); see also *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996). "[T]he challenged bias must have its origin in events or source of information gleaned outside the judicial proceeding." *Cain, supra* at 495-496. "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

Mathis argues that Judge Jones most likely prejudged his guilt because she heard testimony from Gooden and Thompkin about the incident at issue and she reviewed their presentence reports detailing the kidnapping. Mathis also claims that, because of this, Judge Jones had personal knowledge of disputed evidentiary facts. We disagree.

Although Judge Jones presided over Gooden's and Thompkin's plea and sentencing hearings, defendant fails to show that Judge Jones's involvement in those proceedings prevented her from rendering an impartial decision in this case. There is nothing in the record that would lead to the conclusion of partiality, and "suspicions do not constitute proof of partiality or prejudice." *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). We recognize that this Court has found that judicial disqualification was warranted in *People v Gibson*, 90 Mich App 792, 796-797; 282 NW2d 483 (1979), because, even though there was no evidence showing judicial bias during trial, the trial judge expressed belief in the defendant's guilt before trial. However, this is not the case here. There is nothing in the record that discloses actual bias on the part of Judge Jones or shows that she expressed a preconceived notion regarding Mathis's guilt or innocence. *Gibson, supra* at 796-797. Thus, Mathis has failed to prove actual bias or prejudice, and he has failed to show that Judge Jones should have been disqualified. *Wells, supra* at 391.

V. RIGHT OF CONFRONTATION

Defendant Mathis further argues that he was denied his right to confrontation because he was not present when Gooden and Thompkin pleaded guilty before Judge Jones. We disagree.

A. Standard of Review

During a bench trial, a judge must arrive at his or her decision based upon the evidence in the case. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991). If a judge relies on extraneous evidence, a defendant is denied his constitutional right to confront all the witnesses against him and to get all the evidence on the record. *Id.*

B. Analysis

Nothing in the record permits a conclusion that Judge Jones was influenced by outside facts when she rendered her decision. Therefore, because Mathis has not shown that Judge Jones's decision was influenced by outside factors, i.e., Gooden's and Thompkin's plea and sentencing hearings, he has failed to show that he was deprived of his right to due process or his right to confrontation.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette